Nos. 21980 and 21980-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT M. ACTON, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

V. W. CLIFTON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

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OPINION BELOW

The district court's unreported memorandum opinion is contained in the record of No. 21980 at pages 247-250.

JURISDICTION

Jurisdiction of the district court over these consolidated federal condemnation proceedings rests on 28 U.S.C. sec. 1358. Summary judgment was entered on November 3, 1966 (R. 247-250). Notices of appeal were filed on November 18, 1966 (R. 258,314). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether appellants as holders of revocable uranium prospecting permits on lands within the federal public domain are entitled to compensation under the Fifth Amendment to the Constitution when the permits are withdrawn.

STATEMENT

This is an appeal from a summary judgment entered November 3, 1966, declaring that the cancellation by the United States of these 24 appellants' revocable uranium prospecting permits is not a taking of property for which the United States must compensate appellants.

This condemnation proceeding was brought in January 1958 by the United States to acquire a leasehold estate in the outstanding interests in 869,981 acres of land

utilized for the Yuma Test Station in Arizona. Virtually all of this land was federal public domain.

Prior to the commencement of this proceeding, on July 1, 1952, Public Land Order No. 848 [1/] withdrew all public domain within this area from all forms of appropriation under the Public Land Laws, including mining and mineral leasing laws. Thereafter, revocable uranium prospecting permits were issued to appellants by the Atomic Energy Commission pursuant to the authority of Section 67 of the Atomic Energy Act of 1954, as amended, 68 Stat. 919, 934, 42 U.S.C. secs. 2011, 2097, and Title 10 C.F.R. sec. 60.9, which provides that where permits have been issued to prospect for uranium upon lands administered by the governmental agencies those agencies may prescribe additional terms and conditions to permit such agencies to fulfill appropriately their functions and obligations. In the alternative, such agencies may refrain from issuing permits upon such lands. Sec. 60.9(e) reads in relevant part as follows:

1/ Published in the Federal Register on July 8, 1952, 17 Fed. Reg. 6099.

> * * * However, since the lands affected by this section are administered by other Government agencies having responsibilities in connection with the administration of land, it probably will be necessary to include in particular permits and leases additional terms and conditions designed to permit the agencies involved to fulfill appropriately their functions and obligations or to refrain from issuing permits or leases * * *.

In accordance with the provisions of the above regulations, upon receipt of the specified $10 filing fee and of the annual fee of 25 cents per acre specified in Section 60.9 (f), the Commission issued prospecting permits on the Yuma Test Station to appellants (R. 154-155, 156-157, 185-186). Since the Agency having administrative control over the surface of the land was the Department of the Army, all such permits were expressly qualified by the following reservation:

> "5. The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part at any time as he deems it required by military necessity. Such withdrawal may be only temporary or permanent and may be without prior notice, in which event it is agreed that evacuation will be made with the greatest possible expediency, as to personel and equipment."

Appellant Clifton was further notified of the revocable nature of his prospective permit by a letter dated April 23, 1957, from Lawrence J. Lee, Captain, AGG, Adjutant

of the Headquarters Yuma Test Station which expressly stated: "This permit may be withdrawn by the Commanding Officer, Yuma Test Station at any time deemed necessary by him." (R. 158.) It was so withdrawn for military purposes (R. 1).

On April 8, 1964, the United States moved to dismiss the permit holders as parties defendant in this condemnation proceeding on the ground that they were improperly joined because no compensable interests were vested in them. This motion was denied by the Honorable William C. Mathes on July 13, 1964 "without prejudice to renew at a later date." (R. 221.)

On September 16, 1966, certain appellants moved for summary judgment as to the issue of liability of the United States for payment in condemnation (R. 223). The United States cross-moved for summary judgment declaring that said appellants have no compensable interest in the property condemned as a matter of law (R. 238).

On November 3, 1966, the district court made an order denying appellants' motion for summary judgment and granting the Government's motion for summary judgment, holding that the "reservations in the permits in question specifically contemplated the withdrawal of the lands in question and the termination of the permits, which act was accomplished upon the institution of these condemnation proceedings. The defendants

[viz. appellants] acquired the permits with full knowledge of the risks to be incurred." (R. 247-250.) This appeal followed

SUMMARY OF ARGUMENT

In exercising its power of eminent domain, the United States is required by the Fifth Amendment to pay just compensation for property which it takes. Any possessory interest in real property can be private property subject to eminent domain and as such, compensable. Property interests within the meaning of the Fifth Amendment include fee, life estates, terms for years, tenancies from year to year or month to month and subtenancies.

Revocable permits, on the other hand, being mere licenses, create no right, title, interest or estate in land cognizable by the Fifth Amendment, and as such may be withdrawn at any time for use by the sovereign without payment of compensation.

Since appellants held revocable prospecting permits not amounting to vested property rights for which, upon withdrawal, compensation must be made under the Fifth Amendment, they were improperly joined in this condemnation proceeding and summary judgment was properly granted against them.

ARGUMENT

I

THE UNITED STATES IS NOT REQUIRED BY THE FIFTH AMENDMENT TO PAY COMPENSATION WHEN IT WITHDRAWS A REVOCABLE PERMIT FOR URANIUM PROSPECTING ON LANDS WITHIN THE FEDERAL PUBLIC DOMAIN

When the United States takes private property for a public use, the Fifth Amendment requires the Government to pay just compensation. The Fifth Amendment, however, recognizes only vested property rights, not such tenuous rights as licenses and permits, even though they may be valuable.

Thus, an estate or tenancy for years or at will is recognized as private property within the meaning of the Fifth Amendment. United States v. General Motors Corp., 323 U.S. 373, 378-379 (1945). If a tenant's lease has expired, however, and no renewal has been executed, the tenant has no interest in land for which upon condemnation payment must be made. United States v. Honolulu Plantation Co., 182 F.2d 172 (C.A. 9, 1950), cert. den., 340 U.S. 820. See Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007 (C.A. 2, 1944), cert. den., 322 U.S. 747.

So, in United States v. Petty Motor Co., 327 U.S. 372 (1946), the Supreme Court held that a tenant whose lease

contained a "termination by condemnation" clause was without any right of recovery in a condemnation proceeding. As in Petty, appellants herein have "no right which persists beyond the taking and can be entitled to nothing." Likewise in United States v. Marks, 187 F.2d 724 (C.A. 9, 1951), cert. den., 342 U.S. 823, an unconditional reservation in a lease of the Government's right to withdraw public land for national purposes gave rise to no liability in favor of the lessee upon cancellation.

A license does not amount to property for which the United States may be liable upon condemnation. McNeil v. Seaton, 281 F.2d 931, 934 (C.A. D.C. 1960). In Sinclair Pipe Line Company v. United States, 287 F.2d 175 (C.Cls. 1961), a pipeline company sued to recover compensation for the taking of its right to maintain a pipeline across land acquired by the Government through condemnation. The agreement under which the pipeline had been installed recited that the installation was a "privilege as a mere license revocable and terminable upon notice * * *."

The court reviewed the authorities, including Thompson on Real Property (1939 ed.), vol. I, sec. 318, which stated:

> A license is a mere permission or personal and revocable privilege without the licensee possessing any estate in the land. A license possesses no property in land and no interest in it.

The pipeline company was therefore entitled to neither compensation for the loss of its license, nor to payment for its relocation expenses.

Most nearly analogous to appellants' prospecting permits herein are grazing permits on public lands granted to cattlemen under the Taylor Grazing Act. Like prospecting permits, grazing permits create no right, title, interest or estate in public lands, but only a withdrawable privilege. Upon revocation the licensee has no property rights against the United States which are compensable in condemnation. United States v. Cox, 190 F.2d 293, 294, 296 (C.A. 10, 1951), cert. den., 342 U.S. 867; Osborne v. United States, 145 F.2d 892 (C.A. 9, 1944); Bowman v. Udall, 243 F.Supp. 672, 678 (D.C. 1965), aff'd 364 F.2d 676, sub nom. Hinton v. Udall (C.A. D.C. 1966).

Appellants have repeatedly emphasized that they have spent sums of money, apparently under the belief that they have somehow acquired a right, legal or equitable,

against the Government. Appellants are in error. As this Court itself noted in Osborne, many permits issued by the sovereign are highly valuable as between private persons, but they may be revoked by the sovereign without payment of compensation (145 F.2d at 896, fn. 5):

> Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, Louisville Bridge Co. v. United States, 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; United States v. Wauna Toll Bridge Co., 1942, 9 Cir., 130 F.2d 855; licenses to erect river and harbor structures, United States v. Chicago, M., St. P. & P. R. Co., 1941, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064; Willink v. United States, 1916, 240 U.S. 572, 36 S.Ct. 422, 60 L.Ed. 808; Greenleaf Johnson Lumber Co. v. Garrison, 1915, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; United States v. Chandler-Dunbar Water Power Co., 1913, 229 U.S. 53, 70, 33 S.Ct. 667, 57 L.Ed. 1063; Berger v. Ohlson, 1941, 9 Cir., 120 F.2d 56; permits to erect and maintain telephone and power lines, Swendig v. Washington Co., 1924, 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1036; United States v. Colorado Power Co., 1916, 8 Cir., 240 F. 217, 220; licenses to occupy, lease, or sell fishing areas, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 1913, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083.

The court in Cox acknowledged that the grazing permits before the court were valuable, writing (190 F.2d at 295-296):

Unquestionably, the grazing permits were of value to the ranchers. They were an integral part of the ranching unit—indeed, the fee lands are practically worthless without them. But, "the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be." Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 178, 77 L.Ed. 331. The Constitution requires only that the sovereign pay just compensation for that which it takes, "not for opportunities which the owner may lose." United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 282, 63 S.Ct. 1047, 1056, 87 L.Ed. 1390. Just compensation for that which is taken does not include consequential losses to owner. Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644; United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729; United States v. Willow River Power Co., 324 U.S. 499, 510, 65 S.Ct. 761, 89 L.Ed. 1101; United States v. Miller, 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 366. "Such losses may be compensated by legislative authority, not by force of the Constitution alone." United States v. Willow River Power Co., supra, 324 U.S. at page 510, 65 S.Ct. at page 767, 89 L.Ed. 1101.

* * * But, in our view, there can be no legally significant difference in the withdrawal of the permits for war purposes by the Secretary of the Interior, as in the Osborne case, and the cancellation of the permits by a declaration of taking in condemnation proceedings. <u>In either case, the Government, by appropriate action, has exercised its unquestionable power to take only that which it owns, and in which the condemnee has no compensable interest</u>. * * * (Emphasis supplied.)

Appellants in No. 21980 argue that under Section 171 of the Atomic Energy Act of 1946, as amended, 68 Stat. 952, 42 U.S.C. sec. 2221, the Commission is required in condemnation to pay for the revocation of a right to enter. This is not so. Section 171 requires the United States to "make just compensation for any property or interests therein taken or requisitioned * * *." This in no wise adds anything to the underlying concept that the United States must pay only for the taking of private property, not a mere license, as here, which does not rise to the estate of private property within the meaning of the Fifth Amendment. United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 281 (1943). Had Congress intended to change the law and make a gift to licensees, it would have had to do so by express language, as it did when, in 1942, it amended the Taylor Grazing Act by adding Section 315q, which permits payment on administrative determination for the cancellation of grazing permits or licenses where a taking is for "war purposes." 2/ This statute even specifies the fund from which payment is to be made. 56 Stat. 654, as amended, 43 U.S.C. sec. 315q.

2/ Section 315q as originally enacted applied to takings only for "war purposes." Thereafter, the section assumed its present form when it was amended to include takings for "war and national defense purposes."

While, on other occasions, Congress has provided for payment in excess of just compensation, see, e.g., Brown v. United States, 263 U.S. 78 (1923); United States v. Realty Co., 163 U.S. 427 (1896), Congress cannot by implication be held to have made gifts from the public treasury; hence, an assumption of liability not otherwise existing is not to be presumed or implied. Pine Hill Coal Co. v. United States, 259 U.S. 191 (1922). And even where Congress has conferred a gratuity, a "* * * further burden * * * should not be added to the gift without the use of the very plainest language." District of Columbia v. Johnson, 165 U.S. 330, 339 (1897).

Finally, as the opinion of the court below correctly states, appellants' authorities do not sustain their interpretation of Section 66 of the Atomic Energy Act of 1954, as amended, 68 Stat. 933, 42 U.S.C. sec. 2096, as allegedly authorizing compensation to them.[3/] Admiral Oriental Line v. United States, 86 F.2d 201 (C.A. 2, 1936), was a libel in admiralty to recover money paid to respondent's use. Werner

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3/ The congressional direction that "* * * just compensation shall be made for any right, property, or interest in property, taken, requisitioned, condemned, or otherwise acquired under this section" does not operate to convert hitherto non-compensable revocable licenses into compensable property interests within the meaning of the Fifth Amendment. The section merely declares, but does not change, the existing law.

v. United States, 188 F.2d 266 (C.A. 9, 1951), was an action for reformation of a lease and to recover a sum of money for use and occupancy of land leased. Neither case involved revocation of leases or compensable interests. United States v. Nahant, 153 Fed. 520 (C.A. 1, 1907), is likewise distinguishable. There the Government was condemning land previously condemned by the Town of Nahant and the issue was whether the original taking was valid. The court held that the town's interest was sufficient to be compensable.

In sum, the court's holding in the Cox case (190 F.2d at 296), stating the proposition that the withdrawal of a revocable permit is noncompensable, applies with equal force here:

> Although the permits are valuable to the ranchers, they are not an interest protected by the Fifth Amendment against the taking by the Government who granted them with the understanding that they could be withdrawn at any time without the payment of compensation.

II

THERE IS NO SUPPORT IN LAW FOR APPELLANT CLIFTON'S OTHER ASSERTIONS

Appellant Clifton, appearing pro se, has raised various assertions of alleged illegality and error below. Because no major issues are raised, we treat these assertions summarily:

1. Clause 2 of Article VI of the United States Constitution which provides that the Constitution "* * * Shall be the supreme law of the Land;" is incontrovertible; it does not in any way enhance appellant Clifton's case.

2. The Fourth Amendment relating to unreasonable searches and seizures is likewise irrelevant to appellant Clifton's case, and to condemnation proceedings (Br. 2).

3. The Sixth Amendment which guarantees "speedy and public trial by an impartial jury * * * and to have the assistance of counsel for his defense" is expressly limited to criminal prosecutions. The right to a jury trial does not exist in federal condemnation cases, as this Court has held in Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357-358 (1966); see United States v. Hess, 71 F.2d 78, 80 (C.A. 8, 1934). Moreover, there is no indication that any court is prepared to apply the right-to-counsel doctrine established in Escobedo v. Illinois, 378 U.S. 478 (1964), and Gideon v. Wainwright, 372 U.S. 335 (1963), to civil cases. The record reveals, moreover, that appellant Clifton was originally represented by counsel in this proceeding.

4. The granting of summary judgment is not a denial of the right to trial by jury guaranteed by the Seventh Amendment. Ex parte Peterson, 253 U.S. 300 (1920); Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902); United States v. Strangland, 242 F.2d 843 (C.A. 7, 1957); Lindsey v. Leavy, 149 F.2d 899 (C.A. 9, 1945).

5. The prohibition in the Fourteenth Amendment against deprivation of "life, liberty, or property, without due process of law" and the guarantee of "equal protection of the laws" is addressed to the states, not the federal government; in any event, due process of law has been accorded appellant here.

6. Whether the acquisition of land for military use is proper is a legislative function, not open for judicial review. United States v. Twin City Power Co., 350 U.S. 222 (1956); United States ex rel T.V.A. v. Welch, 327 U.S. 546, 551-552 (1946). Likewise, the quantity of the land taken is not reviewable. Berman v. Parker, 348 U.S. 26 (1954).

7. The rights retained by the people under the Ninth Amendment are not disparaged. See Ashwander v. T.V.A., 297 U.S. 288, 330, 331 (1936).

8. The reserved state powers guaranteed by the Tenth Amendment are not violated by the federal action relating to the public domain lands herein. See, Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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JANUARY 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACQUES B. GELIN